

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EMILY FISHMAN, et al.,

Plaintiffs,

v.

TIGER NATURAL GAS, INC., et al.,

Defendants.

Case No. 17-cv-05351-WHA (TSH)

**DISCOVERY ORDER**

Re: Dkt. No. 319

Defendant Tiger Natural Gas, Inc. (“Tiger”) has moved to compel the Pacific Gas and Electric Company (“PG&E”) to comply with a deposition and document subpoena. ECF No. 319. Some procedural background is helpful to understand the motion. On November 20, 2018 Judge Alsup granted class certification with regard to the California recording law, but denied it with respect to the California consumer protection statutes, citing Plaintiffs’ inability to show they can obtain records from PG&E to prove damages on a classwide basis. ECF No. 250.

The following day Plaintiffs served a subpoena on PG&E for a December 7, 2018 deposition concerning six topics about PG&E’s billing data and records. Plaintiffs served an amended subpoena on November 29, 2018 with nine topics of examination, again all about billing data and records. The following day Tiger served a Rule 45 notice on Plaintiffs of Tiger’s intent to serve a subpoena on PG&E. The subpoena’s topics for examination incorporated by reference all of Plaintiffs’ topics and added three more. It also noticed the deposition for December 7, at the same location Plaintiffs’ subpoenas had noticed. In addition, Tiger’s subpoena requested production of certain records (unlike Plaintiffs’ subpoenas, which sought only testimony *about* records). Tiger served the subpoena on PG&E on December 3.

PG&E emailed Plaintiffs its objections to their subpoenas on December 5, 2018. Plaintiffs

1 and PG&E then worked out an agreement that Plaintiffs would drop their deposition subpoenas in  
2 exchange for the Declaration of Kellie Reem. (In brief, the Reem declaration states that PG&E  
3 retains certain data and records since at least July 2013.) At that point PG&E decided not to show  
4 up for the deposition noticed for December 7. However, Tiger had not withdrawn its own  
5 subpoena to PG&E; nor had PG&E served any objections to Tiger's subpoena. At the deposition,  
6 Tiger made a record of PG&E's nonappearance.

7 This looks bad, but there is no evidence that the PG&E attorney responsible for handling  
8 Tiger's subpoena actually knew before December 10 that PG&E had in fact been served with one.  
9 There was a delay in PG&E's assigned paralegal's realizing that the subpoena had been received  
10 due to the large number of subpoenas PG&E received in that time period and the backlog in  
11 logging them following the Thanksgiving holiday. In any event, Tiger did not get to depose  
12 PG&E. On December 13, 2018, PG&E emailed Tiger its objections to the latter's subpoena.

13 On December 16, 2018 Plaintiffs filed a supplemental motion to certify a class under the  
14 consumer protection statutes, saying that the Reem declaration shows that the data exist to support  
15 a finding of classwide damages. Judge Alsup denied this motion, stating that "plaintiffs may have  
16 shown that certain data *exists* but they have not shown that this data is *available*," i.e., that  
17 Plaintiffs can obtain it. ECF No. 331.

18 With that background, the Court turns to the merits of the motion. As an initial matter, the  
19 Court finds that PG&E has not waived its objections to Tiger's subpoena. While PG&E should  
20 have done a better job tracking the subpoena, serving a subpoena only four days before the date of  
21 compliance was unreasonable and prejudiced PG&E's ability to respond in a timely fashion.

22 Rule 45 provides that a district court "must quash or modify a subpoena that" "fails to  
23 allow a reasonable time to comply" or that "subjects a person to undue burden." Tiger's subpoena  
24 fails both of those criteria. With respect to document requests 1-5, PG&E states that although this  
25 information is contained in its Customer Care and Billing database, PG&E does not have a  
26 standard reporting tool that could pull the requested information, so it would have to build, test  
27 and verify a customized report. In addition, because these requests include metering information  
28 and personal identifying information, PG&E would need to provide the affected customers – here,

1 thousands of them – with seven days’ notice and an opportunity to object before producing the  
2 requested data. It was impossible for PG&E to comply with these requests in the four days  
3 between service of the subpoena on December 3 and the December 7 deadline for compliance, or  
4 even in the 11 days between service of the subpoena and the close of fact discovery on December  
5 14. Requests 6 and 7 are much narrower, to be sure, because they relate only to the named  
6 Plaintiffs. But the notice and opportunity to object requirements in Gas Rule 27 also made  
7 compliance by the return date of December 7 a literal impossibility and by the December 14 close  
8 of fact discovery a practical impossibility. Request 8 is again extremely broad, would have  
9 triggered the notice requirement, and could not have been complied with by either December 7 or  
10 14. Deposition topic 1 incorporated by reference all of the Plaintiffs’ deposition topics, and, when  
11 combined with topics 2-4, made four days’ notice (or even 11, if measured against the close of fact  
12 discovery instead of the deadline for compliance stated in the subpoena) an unreasonable time to  
13 comply. Put simply, this was a broad subpoena. A litigant that wants this much information from  
14 a non-party should not wait until the closing days of fact discovery to serve a subpoena like this,  
15 and then demand compliance in four days.

16 Tiger argues it is not to blame for the late service of the subpoena, contending that Judge  
17 Alsup’s November 20, 2018 class certification order is what put it on notice that it needed to  
18 subpoena PG&E for this information. *See* ECF No. 250 at 4 (“Going forward, Tiger bears the  
19 burden of demonstrating that any particular class member does not fit within the class definition  
20 because she switched to Tiger’s program from another CTA.”). In reality, that argument has  
21 nothing to do with most of the deposition topics in Tiger’s subpoena, nor with document requests  
22 3-8. It does relate to document requests 1 and 2 but does not change the fact that there is no way  
23 PG&E could have produced this data in the four days Tiger demanded or even in the 11 days  
24 between December 3 and the close of fact discovery. The Court notes that the only reason Tiger  
25 bears the burden of showing that a particular alleged class member is not actually a member of the  
26 recording law class is Tiger’s “own failure to maintain records” as required by Gas Rule 23. *Id.*

27 However, one issue remains. Tiger’s subpoena had both an offensive purpose (get  
28 information) and a defensive purpose (undermine information PG&E might give to Plaintiffs in

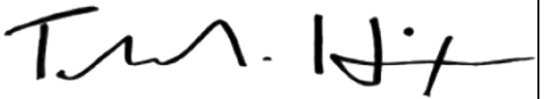
1 response to Plaintiffs' subpoenas). Plaintiffs' subpoenas were an attempt to get information from  
2 PG&E so they could use it in support of their renewed class certification motion. The defensive  
3 purpose of Tiger's cross-notice, and the reason its subpoena incorporated all of Plaintiffs'  
4 deposition topics by reference, was to ensure that Tiger could cross-examine PG&E concerning  
5 whatever information PG&E provided to Plaintiffs. After all, Plaintiffs were trying to get  
6 information to support their renewed class certification motion, and Tiger justifiably wanted to  
7 ensure it had a seat at the table and could also ask the witness questions. When Plaintiffs dropped  
8 their deposition subpoenas in exchange for a declaration, and then PG&E did not show up for  
9 Tiger's noticed deposition, Tiger's ability to cross-examine PG&E was destroyed. Plaintiffs then  
10 ran into Court with the Reem declaration in support of their renewed class certification motion,  
11 untroubled by the possibility that the declaration could be undermined by adverse testimony –  
12 because there wouldn't be any PG&E testimony. This was unfair to Tiger.

13 At oral argument the Court offered to order PG&E to sit for deposition concerning the  
14 content of the Reem declaration. Tiger declined the offer. Yes, at the time it seemed like Tiger  
15 had been prejudiced by the production of the uncross-examined declaration, but it doesn't matter  
16 anymore. Judge Alsup's recent order means that the Reem declaration got Plaintiffs nowhere, and  
17 Tiger sees no need to cross-examine PG&E about it.

18 Accordingly, Tiger's motion to compel PG&E, in its entirety, is **DENIED**.

19  
20 **IT IS SO ORDERED.**

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22 Dated: December 21, 2018

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25 THOMAS S. HIXSON  
26 United States Magistrate Judge  
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